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No. 01-978

In the Supreme Court of the United States

AUGUSTIN DAVID HENDERSON AND
GREGORY FRANCIS PHILLIPS, PETITIONERS

v.

FRAN P. MAINELLA,
DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioners' challenge under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, to a regulation of the National Park Service barring the sale of T-shirts on the National Mall in connection with special events or demonstrations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-15a) is reported at 253 F.3d 12. The orders of the court of appeals denying the petition for rehearing en banc (Pet. App. 43a) and the petition for rehearing (Pet. App. 42a) are unreported. The opinion of the court concerning denial of rehearing (Pet. App. 1a-3a) is reported at 265 F.3d 1072. The opinion of the district court (Pet. App. 30a-40a) is reported at 76 F. Supp. 2d 10.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2001. A petition for rehearing and a petition for rehearing en banc were denied on October 2, 2001 (Pet. App. 1a-3a). The petition for a writ of certiorari

was filed on January 2, 2002 (day following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before 1976, private parties were prohibited from selling goods in National Park areas within the National Capital Region without a permit and, as a general policy, sales permits were not granted. See 59 Fed. Reg. 25,855 (1994). In 1976, the National Park Service issued a final rule allowing the sale or distribution of "newspapers, leaflets, and pamphlets" in connection with demonstrations and special events in most areas of the National Capital Region parks. See 36 C.F.R. 7.96(k)(2).

In the late 1970s, the Park Service received requests from the organizers of certain single-day demonstrations to sell message-bearing T-shirts in connection with those events. Because those events were relatively infrequent, the Park Service determined that it could grant that request without disrupting the quality of the park experience for visitors or otherwise impairing the aesthetic values of National Capital Region parks. See 59 Fed. Reg. at 25,856. Accordingly, the Park Service adopted an enforcement guideline interpreting 36 C.F.R. 7.96(k)(2) to allow the sale of T-shirts that display a message directly related to a permittee's cause or activity. Shortly thereafter, the Park Service revised that guideline to allow the sale of bumper stickers, buttons, and posters as well. See 59 Fed. Reg. at 25,856.

By 1994, the number of individuals and groups seeking to engage in commercial activities in National Capital parks had increased dramatically. In 1994, for example, the National Capital Region was expected to

issue some 3500 demonstration and special event permits. In the area near the Vietnam Veterans Memorial alone, the Region expected there would be 1600 permits, the vast majority of which would include a combination of demonstration and sales activities. At the same time, the Park Service found that vendors were selling a wide-variety of T-shirts year-round, turning parts of the National Mall into a commercial marketplace. See 59 Fed. Reg. at 25,857. The Park Service received numerous complaints from visitors about T-shirt sales, and the Commission on Fine Arts determined that commercial activity around sites like the Vietnam Veterans Memorial had spoiled the beauty of one of Washington's great memorials. See *ibid.* (areas of the Mall were described as resembling a "flea market" due to T-shirt sales).

In 1995, the Park Service rescinded its enforcement guideline allowing the sale of T-shirts, and amended 36 C.F.R. 7.96(k) to permit only the sale of books, newspapers, leaflets, and pamphlets. 60 Fed. Reg. 17,639 (1995). The Park Service explained that experience had shown that allowing T-shirt sales on the Mall is "disruptive to the quality of the park visitor experience," and "negatively impacts on the park land's aesthetic values." 59 Fed. Reg. at 25,858. T-shirt sales had "brought discordant and excessive commercialism to generally tranquil park settings * * *, degraded aesthetic values, visitor circulation, interpretive programs, and historic scenes, [and] inhibited the conservation of park property by denying visitors the variety of opportunities to safe[ly] enjoy park reources." *Ibid.*; see also 60 Fed. Reg. at 17,644 (T-shirt sales led to "intense competition among permittees to get the attention and money of park visitors," creating "a profoundly negative impact on the park experience").

2. Petitioners and others filed separate suits in federal district court challenging on First Amendment grounds the Park Service's 1995 regulation rescinding its rule allowing T-shirt sales on the Mall. While those suits were pending, the Court of Appeals for the District of Columbia Circuit decided two cases regarding the Park Service's 1995 regulation. In *ISKCON* v. *Kennedy*, 61 F.3d 949 (D.C. Cir. 1995), the court upheld the Park Service's 1995 actions insofar as they prohibited sales of audio tapes and religious beads on the Mall. The court further determined that the Park Service's new rule was not substantially broader than necessary to achieve the government's interest in preserving the National Mall for the uses Congress intended, and that the regulation left vendors with ample opportunities to sell prohibited items on property located close to, but outside of, the Mall itself. See *id.* at 958-959.[1]

Subsequently, in *Friends of the Vietnam Veterans Memorial* v. *Kennedy*, 116 F.3d 495 (D.C. Cir. 1997), cert. denied, 522 U.S. 1108 (1998), the court of appeals upheld the Park Service's 1995 rule barring the sale of T-shirts. The court held that the Park Service "may certainly take steps to limit the commercialization of the Mall, and [that] the record is replete with evidence that t-shirt sales * * * substantially contributed to that phenomenon." *Id.* at 497. Moreover, the court noted, the regulations do not forbid anyone from giving away T-shirts on the Mall, and the First Amendment

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[1] In *Kennedy*, the D.C. Circuit struck down a different part of the Park Service's regulation, which had forbidden in-person requests for donations within the area designated for a permittee to engage in demonstration or special event activity. See 61 F.3d at 956. That aspect of *Kennedy* is not at issue here.

protects the "expression inherent in the transmission of the t-shirt from the seller to the buyer—and not the fact that the seller raises money thereby." *Ibid.*

3. In the wake of *Friends*, petitioners moved for leave to amend their complaint to allege certain new claims, including claims under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, and contended that the Park Service's 1995 regulation substantially burdened the free exercise of their religion. See 42 U.S.C. 2000bb-1. The district court allowed the amendment, but held that neither the RFRA claims nor any of petitioners' other new claims stated a cause of action for which relief could be granted, and therefore granted judgment for respondents. See Pet. App. 30a-41a.

With respect to petitioner's RFRA claims (the only claims at issue in this Court), the district court accepted petitioners' contention that they have a "sincere" and "deeply" held religious duty "to communicate the gospel by all available means." Pet. App. 35a. The court was "unable to discern," however, "how this belief is substantially burdened by a regulation barring t-shirt sales on federal parkland in Washington, DC." *Ibid.* The court explained that "[petitioners] may give away their message-bearing t-shirts for free." *Id.* at 36a. As a result, the court stated, "[i]f plaintiffs are unable to disseminate their message by t-shirts on federal parkland in Washington, DC, it is not on the basis that the regulation bars the distribution of message-bearing t-shirts, but on the basis that plaintiffs lack the financial resources to distribute their t-shirts for free." *Ibid.*

4. The D.C. Circuit affirmed. Pet. App. 4a-15a. The court of appeals agreed with the district court that petitioners failed to establish that the Park Service's regulation substantially burdened the free exercise of

their religion in violation of RFRA. The court explained that petitioners did not allege that selling T-shirts on the National Mall was one of the tenets of their religion, see *id.* at 9a, or that their religious beliefs "demand that they sell t-shirts in every place human beings occupy or congregate." *Id.* at 10a. At the same time, the court noted that petitioners' alleged motivation for *selling* their message-bearing T-shirts, as opposed to giving them away, derives from the fact that "the preparation of these materials requires money." *Id.* at 9a. In light of that fact, the court held, petitioners "cannot claim that the regulation forces them to engage in conduct that their religion forbids or that it prevents them from engaging in conduct their religion requires." *Id.* at 10a.

The court of appeals observed that in *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), vacated and remanded, 522 U.S. 801 (1997), the Seventh Circuit "listed among the tests for determining whether there is a substantial burden on the exercise of religion the question whether the governmental restriction forced 'adherents of a religion to refrain from religiously motivated conduct.'" Pet. App. 11a (quoting *Mack*, 80 F.3d at 1179). For several reasons, the court of appeals in this case did not apply that line of inquiry. First, the court noted, "[petitioners] did not advocate it." *Ibid.* Second, the court explained that "[t]o make religious motivation the critical focus" would "read out of RFRA the condition that only substantial burdens on the exercise of religion trigger the compelling interest requirement." *Id.* at 11a-12a. Third, the court explained that *Mack* rested on more than whether the conduct at issue was religiously motivated. Instead, the *Mack* court "indicated that under its test * * * the 'proper and feasible question for the court is simply whether the

practices in question are important to the votaries of the religion.'" *Id.* at 12a.

5. The court of appeals denied petitioners' request for rehearing, with no judge voting to grant rehearing. Pet. App. 1a-3a. In a brief opinion accompanying the denial of rehearing, the court explained that its decision was "unaffected by the [2000] amendments of RFRA," which clarified that RFRA applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* at 2a-3a (quoting Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, § 8(7)(A), 114 Stat. 807, to be codified at 42 U.S.C. 2000cc-5(7)(A)). As the court stated, its prior decision "assumed that [petitioners] wanted to sell t-shirts on the Mall *because of their religious beliefs*," and focused on "whether the Park Service regulation imposed a 'substantial burden' on th[at] exercise of religion." *Id.* at 2a (emphasis added). The amendments to RFRA, the court continued, did not alter the need to evaluate "whether a substantial burden" has been placed on the exercise of religion, nor did the amendments make it inappropriate to consider a plaintiff's *subjective* motivation for desiring to engage in a particular practice in determining whether a substantial burden has been placed on the exercise of religion. *Id.* at 2a-3a.

ARGUMENT

1. RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of fur-

thering that interest." 42 U.S.C. 2000bb-1.[2] As discussed, in 2000, Congress amended RFRA to clarify that the term "religious exercise" in RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." RLUIPA, Pub. L. No. 106-274, § 8(7)(A), 114 Stat. 807. The courts below held that petitioners' RFRA claims do not state a cause of action, because petitioners failed adequately to allege or otherwise show that the Park Service's ban on T-shirt sales on the National Mall substantially burdens the exercise of their religion.

That determination was correct, and does not warrant further review in this Court. The court of appeals did not question that petitioners "wanted to sell t-shirts on the Mall because of their religious beliefs" and, in that regard, were seeking to engage in the exercise of their religion within the meaning of RFRA. Pet. App. 2a. Nor did the court inquire into the "central[ity]" of petitioners' religious beliefs in determining whether they sought to engage in "any exercise of religion," as RFRA proscribes. 42 U.S.C. 2000bb-2(4). But at the same time, the court recognized that RFRA by its terms requires a plaintiff not only to show that he is seeking to engage in an "exercise of religion," but also that the challenged government provision "substantially burden[s]" that exercise of religion. 42 U.S.C. 2000bb-1. See Pet. App. 2a-3a.

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[2] In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), this Court held RFRA unconstitutional as applied to state and local governments. The United States has taken the position that RFRA remains applicable against the federal government after *City of Boerne*, and the lower courts—including the court of appeals in this case—have accepted that view. See Pet. App. 2a; *Kikumura* v. *Hurley*, 242 F.3d 950, 959 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-859 (8th Cir.), cert. denied, 525 U.S. 811 (1998).

Petitioners "alleged that it is their vocation to spread the gospel by 'all available means.'" Pet. App. 10a. They did not allege that selling T-shirts on the National Mall is a tenet of their religion, *id.* at 9a, nor that their religious beliefs "demand that they sell t-shirts in every place human beings occupy or congregate." *Id.* at 10a. As a result, the burden in this case is not a prohibition on distributing T-shirts, but only against selling them in a particular place. Petitioners are permitted to spread the gospel by distributing message-bearing T-shirts (and other messages) for free on the Mall, and petitioners may *sell* T- shirts off the Mall. *Ibid.* The record therefore supports the court of appeals' determination that the Park Service's regulation does not substantially burden petitioners in the free exercise of their religion.[3]

2. Petitioners contend that the regulation nonetheless imposes a substantial burden on the exercise of their religious vocation because "the preparation of [T-shirts] costs money," and "the distribution of such materials for an amount that covers the cost to create them * * * enable[s] [them] to carry out [their] vocation." Pet. App. 9a-10a. In the First Amendment context, however, this Court has determined that such an indirect financial cost does not impose a substantial

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[3] If the Park Service's regulation banning the sale of T- shirts on National Mall venues like the Vietnam Veterans Memorial substantially burdens petitioners in the exercise of their religion, then it is difficult to see how a rule banning the sale of T-shirts in any place people congregate, including the steps of Congress, would not impose the same type of burden, and thus trigger the compelling interest inquiry. Nothing in RFRA compels that counter-intuitive conclusion.

burden on the free exercise of religion, and that understanding is instructive in applying RFRA.[4]

For example, in *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989), the Court held that the Commissioner of Internal Revenue did not violate the Free Exercise Clause by disallowing deductions taken by individuals on their federal income tax for payments they made to their church for "auditing" and "training" services. The Court based its ruling on the ground that allowing the deduction would have impaired the government's compelling interest in maintaining a sound tax system. See *id.* at 699-700. The Court, however, also expressed doubts about whether plaintiffs had articulated a cognizable burden on their free exercise of religion. Noting that petitioners' church did "not proscribe the payment of taxes in connection with auditing or training sessions specifically," *id.* at 699, the Court observed that "[a]ny burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions." *Ibid.* The Court then observed that it was "unclear" that such an indirect financial cost exacted a substantial burden on the exercise of religion for purposes of the Free Exercise Clause.

In *Jimmy Swaggart Ministries* v. *Board of Equalization*, 493 U.S. 378 (1990), the Court rejected a religious organization's argument that the Free Exercise Clause gave it the right to avoid paying state and local

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[4] In enacting RFRA, Congress indicated that courts should "look to free exercise of religion cases decided prior to [*Employment Division* v. *Smith*, 494 U.S. 872 (1990)] for guidance in determining whether or not religious exercise has been substantially burdened." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993); accord S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993).

sales and use taxes on its sales of religious materials. The Court noted that there was no evidence that collection and payment of the taxes violated appellant's religious beliefs, and that the "only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant's wares (caused by the marginally higher price) and from the costs associated with administering the tax." *Id.* at 391. Citing *Hernandez*, the Court held that that indirect financial impact does not constitute a substantial burden on the free exercise of religion: "As the Court made clear in *Hernandez*, to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant." *Ibid.*

Hernandez and *Jimmy Swaggart Ministries* support the result reached by the court of appeals below. As noted above, petitioners do not contend that selling their T-shirts, as opposed to giving them away, has any religious significance to them apart from the fact that selling the T-shirts allows them to recover the costs of producing the T-shirts. Thus, the only alleged burden that a T-shirt sales ban imposes on petitioners is a "reduction in income" with respect to the costs of such shirts, *Jimmy Swaggart Ministries*, 493 U.S. at 391, which this Court has indicated may not rise to a substantial burden under the First Amendment. See *ibid.*

3. Petitioners point (see Pet. 22-23) to the statement in *Hernandez*—repeated in *Employment Division* v. *Smith*, 494 U.S. 872, 887 (1990)—that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." 490 U.S. at 699. But in the very next sentence of the

Court's decision in *Hernandez*, the Court stated: "We do, however, have doubts whether *the alleged burden* imposed by the deduction disallowance on the [accepted religious] practices is a substantial one." *Ibid.* (emphasis added). As discussed, in *Jimmy Swaggart Ministries*, the Court further held that the indirect financial burden on religious exercise was *not* constitutionally substantial. See 493 U.S. at 391-392. The court of appeals' application of RFRA in this case is consistent with the same mode of analysis. See Pet. App. 2a-3a. Accordingly, the result reached by the court of appeals—that a ban on T-shirt sales on the Mall does not substantially burden petitioners' free exercise of religion—is consistent with this Court's precedents.[5]

Nor does the reasoning of the court below conflict with the Court's precedents. Although it is not appropriate for a court to "question the centrality of particular beliefs or practices to a faith," *Hernandez*, 490 U.S. at 699, this Court has stated that courts may consider whether assertions of burdens on religious exercise are sincere as a subjective matter in individual cases. See, *e.g.*, *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding

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[5] Petitioners also cite (Pet. 11) *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). That case stands for the inapposite proposition that "the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Id.* at 449; see *ibid.* ("If civil courts undertake to resolve * * * controversies [over religious practices or beliefs] in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.").

that petitioner terminated his work *because of an honest conviction* that such work was forbidden by his religion.") (emphasis added). The court of appeals' decision in this case is consistent with that understanding.

In evaluating petitioners' claims, the court of appeals referred to petitioners' *own* assertions of their religious beliefs, as opposed to offering its own view of what is important under petitioners' religion. For example, the court's initial decision notes that "[p]laintiffs do not claim to belong to any [religious group that has as one of its tenets selling t-shirts on the Mall], nor do they allege that selling t-shirts in that particular area of the District of Columbia is central to the exercise of their religion." Pet. App. 9a. Likewise, the opinion on rehearing notes that "[i]n reaching our judgment we examined the importance of selling t-shirts on the Mall *to the plaintiffs*." *Id.* at 2a (emphasis added). That approach is consistent with this Court's decisions. It respects adherents' own views about what is central to their faith and does not violate the principle that courts should not question the centrality of religious beliefs to a particular religious faith.

4. Nor is there any circuit conflict warranting this Court's review. Petitioners claim that the court of appeals' application of RFRA in this case conflicts with the approach taken by the Second and Seventh Circuits. See Pet. 18-19 (citing *Jolly* v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996), and *Mack* v. *O'Leary*, 80 F.3d 1175 (7th Cir. 1996), vacated and remanded, 522 U.S. 801 (1997)). As the court of appeals explained below, the Seventh Circuit's decision in *Mack*—which was vacated by this Court—is susceptible to different interpretations. See Pet. App. 11a-12a. Indeed, the court in *Mack* observed that any "verbal differences" in the lower court cases on the application of RFRA "may be acci-

dental, or may come to nothing in practice." See 80 F.3d at 1178. Moreover, the court in *Mack* recognized —as did the D.C. Circuit below—that courts may conduct a subjective inquiry into "whether the practices in question are important *to the votaries of the religion*." *Id.* at 1180 (emphasis added). Similarly, the court in *Jolly* recognized that courts may consider "whether a claimant *sincerely* holds a particular belief." 76 F.3d at 476 (emphasis added).

In any event, as discussed above, Congress recently amended RFRA to make clear that an exercise of religion need not be "compelled by, or central to, a system of religious belief" to be an "exercise of religion" under RFRA. RLUIPA, Pub. L. No. 106-274, § 8(7)(A), 114 Stat. 807. The lower court decisions that petitioners argue limit RFRA's protection to beliefs that are central to a religion and that are mandated, as opposed to motivated, by religion, see Pet. 20-21, were decided before Congress enacted that clarifying amendment in 2000. Even if the courts had disagreed on the interpretation of RFRA before the recent amendments, there would be no reason for this Court to resolve any such disagreement in the wake of those amendments. More important, as the court of appeals explained, the 2000 amendments do not alter the conclusion in this case that the challenged regulation does not impose a substantial burden on petitioners in their exercise of religion. See Pet. App. 2a-3a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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